

FEDERAL CIRCUIT COURT OF AUSTRALIA

*HONG v MINISTER FOR IMMIGRATION &
ANOR*

[2019] FCCA 3500

Catchwords:

MIGRATION – Partner visa – decision of the Administrative Appeals Tribunal – whether Tribunal was required to consider interests of the child – where the Tribunal failed to disclose certificate – whether failure to disclose certificate was material to outcome – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 375A, 476
Migration Regulations 1994 (Cth), reg. 1.15A, cl.801.221 of sch.2

Cases cited:

AOK17 v Minister for Immigration & Border Protection [2019] FCA 1971
ARG15 v Minister for Immigration & Border Protection [2016] FCAFC 174
AZAEH v Minister for Immigration & Border Protection [2015] FCA 414
AZAEY v Minister for Immigration & Border Protection [2015] FCAFC 193
Bala v Minister for Immigration & Border Protection [2019] FCA 600
BEG15 v Minister for Immigration & Border Protection [2017] FCAFC 198
Bui v Minister for Immigration & Citizenship [2010] FCA 234
CNY17 v Minister for Immigration & Border Protection [2018] FCAFC 159
Craig v State of South Australia (1995) 184 CLR 163
He v Minister for Immigration & Border Protection [2017] FCAFC 206
Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464
Minister for Immigration & Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration & Border Protection v Singh (2016) 244 FCR 305
Minister for Immigration & Border Protection v SZMTA (2019) 264 CLR 421
Minister for Immigration & Citizenship v Li [2013] HCA 18
Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration & Citizenship v SZNVW [2010] FCAFC 41
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration v Jia Legeng (2001) 178 ALR 421
Minister of State for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 228 CLR 294
SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship [2013]

FCAFC 80

Tumil-Ang v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2019] FCA 1824

Applicant:	LONGDY HONG
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	PEG 101 of 2016
Judgment of:	Judge Kendall
Hearing date:	27 November 2019
Date of Last Submission:	27 November 2019
Delivered at:	Perth
Delivered on:	5 December 2019

REPRESENTATION

Applicant: In Person

Counsel for the First Respondent: Ms S J Oliver

Second Respondent: Submitting appearance, save as to costs

Solicitors for the Respondents: Sparke Helmore Lawyers

ORDERS

(1) The application be dismissed.

(2)

(3)

(4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 101 of 2016

LONGDY HONG

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By application filed in this Court on 1 March 2016, the applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (the “Tribunal”) dated 3 February 2016.
2. The Tribunal’s decision affirmed a decision of a delegate of the first respondent (the “Minister”) to not grant the applicant a Partner visa (the “visa”).
3. This proceeding is brought pursuant to s.476(1) of the *Migration Act 1958* (Cth) (the “Act”). To succeed in this Court, the applicant must show that the Tribunal fell into jurisdictional error.

4. This matter has a protracted history. When the applicant first filed his application in this Court in 2016, he was unrepresented. He later obtained legal representation. Unfortunately, that representation ceased to act for the applicant in September 2018.
5. This matter was originally listed to be heard on 4 October 2018. The matter was not heard substantively on that occasion. Instead, the Court granted the applicant leave to orally amend his application to include a ground of review relating to a certificate that had been issued under s.375A of the Act.
6. At that time, the High Court had reserved its decision in *Minister for Immigration & Border Protection v SZMTA* [2019] HCA 3 (“SZMTA”) (discussed in detail below). That case pertained to the validity of, and obligations arising from, certificates of the sort seen here. The matter was adjourned accordingly.
7. Unfortunately, due to a lack of judicial availability, the matter could not be listed again for hearing until 27 November 2019.
8. On that occasion, the applicant again appeared without legal representation. It is the Court’s preference that interpreters appear in person. Due to a lack of interpreters trained in the applicant’s dialect, no interpreter could be found in Perth. As a result, the interpreter appeared over the telephone from another state. This is, admittedly, less than ideal. However, had the matter been adjourned again it might not have been re-listed until early 2021 – such is the current backlog in migration listings in the Court nationally.
9. In the circumstances, the Court proceeded as follows.
10. At the commencement of the hearing, the Court advised the applicant that an interpreter would appear by telephone. The Court asked the applicant if he agreed to this course of action. The applicant indicated that he agreed. The applicant was then advised that if, at any time, the Court or the applicant felt that the interpretation services being provided were not adequate those concerns would be addressed. The Court is satisfied that such a course would not have denied the applicant any procedural fairness: *AOK17 v Minister for Immigration & Border Protection* [2019] FCA 1971 at [7]-[8].

11. In any event, the applicant subsequently indicated that he would speak to the Court directly and in English. He was advised that the interpreter would remain on the telephone and if, at any time, he needed to use the interpreter he simply needed to indicate that he wished for translation to be provided. The Court is satisfied that the applicant was able to actively participate and engage with the Court.
12. The Court had before it the applicant's application for judicial review, an affidavit of the applicant dated 1 March 2016, an affidavit of Leith Ann Helsdon dated 27 March 2018, a Court Book ("CB") numbering 477 pages (marked as Exhibit 1), correspondence dated 27 March 2018 confirming service of Ms Helsdon's affidavit (marked as Exhibit 2), an outline of submissions from the Minister dated 26 September 2018 and an outline of written submissions from the applicant dated 4 October 2018.

Background

13. The Minister's submissions at [6]-[12] summarise the factual background to this matter. The applicant's submissions at [7]-[13] repeat this summary. The Court accepts the summary as accurate and adopts it, with some additions, as its own as follows.
14. The applicant, a citizen of Cambodia, lodged an application for the visa on 18 June 2012 (CB 1-180). The applicant was sponsored by his wife, Chenda Va (the "sponsor"). The applicant and the sponsor had been married on 11 May 2012 (CB 42 and 449 at [41]).
15. On 12 September 2014, the sponsor had a child (CB 209). The applicant is not the biological father of the child. The child's biological father is "Jeremy Toh" (CB 300).
16. On 19 September 2014, the applicant was invited to comment on information obtained during an interview with the sponsor by a person from the Minister's department (CB 182). That letter read:

...In accordance with section 57 of the Migration Act 1958 (the Act), I am writing to advise you that information has been received which a delegate of the Minister considers would be the reason, or a part of the reason, for refusing to grant a visa.

A telephone interview was conducted on 19 September 2014 with your sponsor, Ms Chendra Va, who stated that you purchased the property at [address omitted] with a 'Jeremy Toh'. Your sponsor has also listed Jeremy Toh as her emergency contact on the incoming passenger card on 8/1/2014. When asked to explain, your sponsor stated that she did not put you down as an emergency contact as you work nights and Jeremy was living at the house.

The Department also has information that your sponsor has travelled overseas twice with Jeremy Toh.

...

You are invited to comment on the information that you are no longer the spouse or de facto partner of your sponsor.

...

I invite you to comment on the above information. Please provide evidence of your recent house purchase, including the bank transfers. Provide the current utility bills for the last 6 months. Please also provide an explanation as to why you would buy a house with Jeremy Toh, one of your sponsor's friend and what is the relationship between your sponsor and Jeremy Toh.

17. On 17 October 2014, the applicant's authorised recipient responded to the Department's request for information and provided a letter from the applicant dated 16 October 2014 (CB 201). The applicant methodically responded to the request for information and emphasised that Mr Toh was a "close friend". He further attested that the relationship between the applicant and the sponsor was genuine and continuing (CB 202-245).
18. On 5 November 2014, a delegate of the Minister refused to grant the visa (CB 248). The delegate was not satisfied that the applicant was the sponsor's spouse (as that term is defined in the Act) at the time of the decision (CB 248-269).
19. On 25 November 2014, the applicant applied to the Tribunal for a review of the delegate's decision (CB 271-281).
20. On 8 December 2014, a certificate was issued under s.375A of the Act in relation to five folios on the applicant's file (CB 286). It was stated

in the certificate that disclosure of the material would be contrary to the public interest.

21. In a document dated 5 October 2015, the applicant provided to the Tribunal a written response to the delegate's decision and his reasons for disagreeing with the decision (CB 297-309). Attached to that document were various other supporting materials, including statutory declarations from the applicant's friends and the sponsor and financial documents (CB 310-423).
22. In a letter accompanying the submissions, it was indicated that the applicant had 9 witnesses who would be available to give evidence (CB 295-296).
23. On 9 October 2015, the Tribunal advised that 8 of those persons would not be required to attend or give evidence at the hearing. The email advised as follows (CB 424-425):

The Member will proceed in respect of the evidence from the witnesses statutory declarations. If there are some questions that arise as to the credibility of that evidence, then another hearing may be scheduled to take evidence in person from some, or all of those witnesses.
24. On 13 October 2015, the applicant attended a hearing before the Tribunal. He was assisted by his representative and his sponsor. Three witnesses participated in the hearing (CB 426-430).
25. At the conclusion of the hearing the applicant was given until 20 October 2015 to provide any further information or a response in writing.
26. On 19 October 2015, the applicant provided a further written submission and supporting documents (CB 431-440).
27. On 3 February 2016, the Tribunal affirmed the delegate's decision not to grant the applicant the visa (CB 443-455).

Tribunal's decision

28. The Tribunal's decision is 13 pages long and spans 66 paragraphs. One page extracts the provision of the *Migration Regulations 1994* (Cth) (the "Regulations") that are applicable to the applicant's particular visa.
29. The Minister's submissions describe the Tribunal's decision in detail. The applicant does not cavil with this summary. Rather, in his own submissions he adopts the summary provided and then makes submissions about what he believes the Tribunal "did wrong". Having reviewed the Tribunal's decision in detail, the Court is satisfied that the Minister's submissions at [17]-[25] accurately summarise the Tribunal's decision. The Court adopts the summary provided as its own, with some amendments, as follows.
30. At [1]-[4], the Tribunal summarised the procedural background relevant to the visa in question.
31. At [5]-[6], the Tribunal noted that it had received written submissions and various supporting documents from the applicant (via his authorised recipient) on 6 October 2014. The Tribunal summarised those submissions and identified the various documents submitted.
32. At [10]-[15], [27], [29] and [31], the Tribunal summarised the evidence given by the applicant and his responses to the questions that were asked of him by the Tribunal.
33. At [16]-[21], [27] and [30], the Tribunal summarised the evidence of the sponsor.
34. The Tribunal also referred to the oral evidence given by the witnesses who participated at the hearing, as follows:
 - a) Ms Vatana Ma, a family friend of the sponsor (at [22]);
 - b) Mrs Sao Ran, the sponsor's mother (at [23]-[24]);
 - c) Ms Kuntheea Mann, a friend of the sponsor (at [25]-[26]); and
 - d) Ms Jenny Lim, Vice President of the Ankor Wat Buddhist Society (at [28]).

35. At [33]-[36], the Tribunal confirmed that it had received the post hearing submissions and outlined their content.
36. At [38], the Tribunal identified that the issue before it was whether the applicant and sponsor met the criteria in cl.801.221 of the Regulations. The Tribunal noted that to satisfy cl.801.221(2)(c) of the Regulations the sponsor must be the “spouse” of the applicant as that term is defined in s.5F of the Act as informed by reg.1.15A(3) of the Regulations (at [39]-[40]).
37. The Tribunal accepted that the applicant and sponsor were validly married as required by s.5F(2)(a) of the Act (at [41]).
38. The Tribunal then turned to consider whether the other requirements for a spousal relationship were met.
39. At [42], the Tribunal made the following observations as to the credibility of the evidence that had been provided:

42. *As a preliminary matter, the Tribunal sets out at this point its concerns as to the credibility of some of the evidence of the applicant and his sponsor. These concerns developed in its review of this matter and in considering and weighing all of the evidence. It has ignored minor inconsistencies, for example where the applicant has claimed that the funds for the deposit for the house in Ellen Brook came from the sponsor’s parents, but in a written submission claimed they came from his parents. However, more significantly, the Tribunal found the sponsor’s oral evidence at the hearing appeared to be evasive at times, when, for example, she spoke about the support provided by Mr Toh in respect of [A]. In this respect, it found the sponsor and the applicant provided inconsistent evidence on Mr Toh’s financial contribution to the house and the support Mr Toh claimed by the applicant that he provides for [A]. This is discussed further in the relevant paragraph below. It also found the applicant’s and his sponsor’s explanation of the financial arrangement in respect of the purchase of the property in [address omitted] Ellen Brook to be unconvincing, at times confusing, and at other times inconsistent. For example, the Tribunal was told Mr Toh does not pay mortgage, but then it was provided with a statement indicating he is a joint borrower, with the applicant, in a significant loan with the NAB. It was also submitted that Mr Toh pays \$200 per week*

to repay the deposit which was paid by the sponsor's parents, whereas this was also referred to a repayments towards the mortgage. The Tribunal also notes the applicant - has claimed that the sponsor's brother also pays the mortgage for the property. Having regard to all of the evidence, the Tribunal also formed the view that the applicant and the sponsor sought to conceal the paternity of the child [A] from the Department by not disclosing her father's name on the birth certificate, and by not declaring to the Department the uncertainty, if uncertainty indeed exist, of the paternity of the child. It notes the submission from the applicant now indicates that the birth certificate has been amended. Other aspects in the circumstances of this case, as set out in the following paragraphs, add to the Tribunal's concerns about the credibility of the applicant's and the sponsor's evidence and to the lack of satisfaction that this is a genuine and continuing spousal relationship.

40. In relation to the financial aspects of the relationship, the Tribunal:
- a) found that, whilst the applicant and sponsor had a joint bank account and had provided some superannuation evidence, this evidence was not of itself determinative (CB 450 at [43]-[44]). Further, the Tribunal found that the fact that the sponsor is listed as a beneficiary to the applicant's superannuation did not overcome other evidentiary deficiencies (CB 450-451 at [44]);
 - b) noted that there appeared to be some evidence of sharing of day-to-day household expenses. The Tribunal accepted that the sponsor had access to the applicant's account as well as their joint account and that bills were paid from the money in those accounts (CB 450 at [44]);
 - c) found that, whilst there appeared to be some sharing of day-to-day household expenses, there may be a sharing of household expenses in a range of different relationships, which include cohabitation, but which are not necessarily genuine, exclusive, and continuing (CB 450 at [44]);
 - d) found that the applicant and the sponsor had given inconsistent evidence as to Mr Toh's financial contribution towards the house and the support he provided for the child (CB 450 at [45]);

- e) found that the applicant and Mr Toh had taken out a loan with Homeside (NAB) for approximately \$479,000 for the purchase of the property in which the applicant and the sponsor resided (CB 451 at [45]). The Tribunal accepted that, despite there being no evidence of the sponsor's credit history, the sponsor's claim that she has a bad credit rating was plausible (CB 451 at [45]);
- f) found that there appeared to be no objective evidence that the sponsor's parents contributed \$70,000 towards the purchase of the property and no evidence which indicated that they had an interest in the property (CB 451 at [46]); and
- g) found that the sponsor's evidence at the hearing in relation to Mr Toh's repayments to the property was not consistent with the written evidence (CB 451 at [46]).

41. In relation to the nature of the household, the Tribunal found:

- a) the applicant and the sponsor reside at the same address and share housework and provide care and support to the applicant's child (CB 451 at [48]);
- b) Mr Toh did not reside at the property full-time as he is working in the mines (CB 451 at [49]); and
- c) given that the applicant has significant motivation to acquire the visa (to enable him to continue in employment, continue to own the property and to have the ability to service the substantial loan for which he is jointly liable), that the evidence before it as to the nature of the household was inconclusive as to whether there was a genuine and continuing spousal relationship (CB 452 at [50]).

42. In relation to the social aspects of the relationship, the Tribunal:

- a) was not satisfied that the sworn statutory declarations from the witnesses relied upon by the applicant should alone be determinative but did consider that "these witnesses were not in any way giving evidence which was other than their genuine belief" (CB 452 at [52]);

- b) accepted that photographs depicted the applicant and sponsor in a variety of social settings but did not find these to be significant or persuasive as to the true nature of the relationship (CB 452 at [53]);
 - c) accepted the evidence of the applicant, the sponsor and their witnesses that the applicant and the sponsor undertook some joint social activities (CB 452 at [54]);
 - d) noted that the sponsor had travelled overseas twice but was unaccompanied by the applicant. She was, instead, accompanied by Mr Toh (CB 452 at [54]). One trip was to Cambodia to help the sponsor's parents build a house. The second was to Bali to attend the wedding of Mr Toh's brother's (CB 452 at [54]); and
 - e) found that the applicant's failure to accompany the sponsor during her overseas travels undermined the claim they were in a genuine and continuing relationship (CB 452 at [54]), particularly given that the sponsor was accompanied on her travels by Mr Toh, the biological father of the child (CB 452-453 at [54]).
43. In considering the nature of the applicant's and sponsor's commitment to each other, the Tribunal:
- a) noted that the applicant had told the Tribunal he wanted the chance to look after his wife and look after the child (as her step father) (CB 448 at [31]);
 - b) accepted that the parties met in December 2011 and married in May 2012 (CB 453 at [56]);
 - c) considered the birth of the sponsor's child to another man 16 months after the sponsor and the applicant married to be a matter of importance (CB 453 at [57]). This was particularly so given evidence which the Tribunal found to be unsatisfactory and the unclear explanations it had received as to the financial arrangements between the applicant and Mr Toh and the sponsor's parents (CB 453 at [57]);
 - d) having regard to all the circumstances, to its assessment that the applicant and the sponsor concealed the paternity of the child in

the application to the Department, together with its observations as to the sponsor's evasiveness at the hearing in relation to relationship with Mr Toh, was not satisfied with the applicant's or the sponsor's evidence in respect of the role and support they claim Mr Toh had in relation to the child (CB 453 at [58]);

- e) was not persuaded by the reasons given by the applicant as to why Mr Toh was nominated as the sponsor's emergency contact on her incoming passenger cards (CB 453 at [59]). The Tribunal rejected the applicant's explanation as lacking credibility and found that the sponsor's reference to Mr Toh as her emergency contact, when considered in light of all the evidence, reflected the nature of the relationship and undermined the claims that the applicant and the sponsor's relationship was a genuine and continuing spousal relationship (CB 453-454 at [59]);
- f) was not satisfied that the applicant and the sponsor provided any significant emotional support or degree of companionship to each other (CB 454 at [60]);
- g) noted the applicant's claim that he wanted the chance to look after the sponsor and her child (CB 454 at [60]) but was not satisfied as to the genuineness of that claim and considered, in light of all the evidence, that that claim was tailored for the purposes of bolstering the applicant's claim for the visa (CB 454 at [60]); and
- h) based on the evidence the applicant and the sponsor had provided, was not satisfied that they themselves view the relationship a long term relationship (CB 454 at [60]).

44. Overall, the Tribunal placed less weight on the financial aspects of the relationship (CB 451 at [47]), found the evidence of the nature of the household to be inconclusive of a genuine and continuing relationship (CB 452 at [50]) and found that the parties' limited evidence as to joint social activities was undermined by other evidence (CB 452 at [54]).

45. In all the circumstances, the Tribunal was not satisfied that the applicant met the requirements of cl.801.221(2)(c) of the Regulations (CB 454 at [63]).

Proceedings in this Court

46. Regrettably, the proceedings in this Court have been protracted. While the applicant was legally represented for a period of time, no amended application was filed.
47. The three grounds in the judicial review application which the Court will address are as follows:
1. *The Administrative Appeals Tribunal (Migration & Refugee Division) decided to affirm the delegate's decision not to grant the applicant, Longdy Hong a Partner (Residence) (Class BS) visa on the grounds that it is not satisfied that the applicant's marriage relationship is not genuine and continuing.*
 2. *The Tribunal committed a jurisdictional error by not taking into consideration the interest of the child, [A] (DOB 21 September 2014) if the applicant is refused a visa to remain in Australia.*
 3. *The Tribunal also erred jurisdictionally by not addressing the compassionate and compelling circumstances of the applicant in relation to the applicant's relationship with the child, [A]. If the applicant leaves Australia the child will suffer as she is denied contact with the applicant.*
48. In addition to these three grounds, the Court allowed the applicant to orally amend his application to include a ground relating to the certificate issued on 8 December 2014. The Court will refer to this below as the "Additional Ground". The Court and the Minister have approached this additional ground on the basis that the applicant is arguing that he was denied procedural fairness.
49. The applicant's affidavit contained 10 paragraphs as follows:
1. *I am the husband of Chinda Va (Sponsor) and I am living in a married relationship with her, together with the wife's daughter, [A] (DOB 12 September 2016).*
 2. *We all reside at [address omitted] since mid-2014. Previously I resided with the wife at [address omitted] when I arrived in Perth around May 2013 till such time we moved to the new address in Ellenbrook.*

3. *I applied for a Partner Visa with the Department on 18 June 2012 and my visa was granted and I arrived in Perth in May 2013 to be with my wife.*
4. *I then applied for a Partner (Residence) Class BS visa around July 2014. The delegate refused the visa on 5 November 2014 as she was not satisfied that our relationship was genuine and continuing.*
5. *On 25 November 2014 I applied to MRT for a review of my case. The MRT held a hearing on 13 October 2015. Unfortunately, the MRT affirmed the delegate's decision on 3 February 2016 not to grant me stay in Australia stating that it is not satisfied that my relationship with the wife is genuine and continuing. Enclosed at ANNEXURE marked "A" is a copy of the MRT decision record.*
6. *I wish to affirm that mine is a genuine and continuing relationship as we have been living together ever since I arrived in Australia. I also live with the wife's daughter [A] in Ellenbrook.*
7. *I believe my relationship is genuine and continuing and I have provided sufficient evidence to this effect to the Tribunal. We have both been raising the child, [A] together since her birth. I look after the child and play an important role in her life, both personally and emotionally. I have contributed to the child's welfare and development ever since she was born. I take her to the park, to the doctor and looked after her considerably. I have a close bond with the child.*
8. *My relationship with the child will be affected if I am not allowed to live in Australia. If I leave Australia the child will be denied contact with me and it will considerably affect her personal and emotional development.*
9. *My wife also suffers from depression of which the Tribunal is aware. We will all suffer as a result of my departure from Australia.*
10. *I believe that the court should remit my application to MRT requesting them to look at the compassionate and compelling circumstances of my case and allow me to stay in Australia to be with my wife and child.*

50. As noted, the applicant did not file any amended application. He also did not file any further affidavit evidence, despite being offered an opportunity to do so. Written submissions were, however, filed by the applicant. While they were not filed in accordance with the time prescribed by the Court, the Minister raised no issue with the Court accepting these submissions.
51. As noted, the Minister filed written submissions and relied upon the evidence contained in Ms Helsdon's affidavit.
52. At the hearing on 27 November 2019, the Court confirmed with the applicant that he had received a copy of the Court Book. The Court also confirmed that the applicant had received Ms Helsdon's affidavit.
53. The applicant confirmed that he had received a copy of the Court Book (but had not brought it with him). It was clear from the contents of the applicant's own written submissions that he had had an opportunity to review the Minister's submissions.
54. The applicant was advised that if any references were made to the Court Book, he would be given a copy of any relevant pages from the Court Book or have relevant passages read out to him.
55. The applicant confirmed that he did not have a copy of Ms Helsdon's affidavit (relevant to the certificate issue). When provided with a copy, he confirmed that he had seen the documents. The Minister also tendered Exhibit 2 to confirm that Ms Helsdon's affidavit had been served on the applicant (having been served on his legal representatives) on 27 March 2018. The applicant was given an opportunity at hearing to again review the documents attached to Ms Helsdon's affidavit.
56. Noting that the applicant was not legally represented, the Court explained to him that this Court's role is restricted to determining whether the Tribunal fell into jurisdictional error. It was explained that in relation to migration matters of this sort, the main categories of jurisdictional error usually raised by applicants are:
 - a) where the decision-maker identifies the wrong issue or asks the wrong question: *Craig v State of South Australia* (1995) 184 CLR 163 ("*Craig*") at [198];

- b) where the decision-maker ignores relevant material: *Craig* at [198];
- c) where the decision-maker relies on irrelevant material: *Craig* at [198];
- d) where the decision-maker fails to follow mandatory procedures: *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 294 at [207]-[208];
- e) where the decision-maker shows actual or apprehended bias: *SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship* [2013] FCAFC 80 at [2] (“SZRUP”); *AZAEY v Minister for Immigration & Border Protection* [2015] FCAFC 193 at [16]-[17]; and
- f) where the decision is illogical, irrational or unreasonable: *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 at [131]; *Minister for Immigration & Citizenship v Li* [2013] HCA 18 at [26]-[28]; *Minister for Immigration & Border Protection v Singh* (2014) 231 FCR 437 at [44].

57. It was also explained to the applicant that many applicants who appear before this Court assume that the Court will review the evidence before the Tribunal as a whole and, if it comes to a different conclusion, give the applicant the visa he or she is seeking. The Court explained that it cannot do this as this would require the Court to engage in an impermissible merits review of the Tribunal’s decision: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

58. Against this background, and in accordance with the remarks of Federal Court that an unrepresented applicant should be provided an opportunity to orally raise any grounds of review or identify any error (see *Bala v Minister for Immigration & Border Protection* [2019] FCA 600), the Court asked the applicant to make any comment he wished to make which might better assist the Court understanding what he meant by his ground of review. In effect, the applicant was asked to explain what he felt the Tribunal “did wrong”.

59. The applicant stated that it was “unfair” that the certificate was not disclosed to him. He said that the Tribunal was biased because the Tribunal had access to the certificate and took it into account. He also noted that just because the child is not his biological child does not mean that she is not his child “under the family law”. In closing submissions, the applicant reiterated that it was unfair that there was a certificate and that he did not know what was in that certificate.
60. The applicant’s submissions at hearing are relevant to ground 2 and the “Additional Ground” discussed below.

Ground 1

1. *The Administrative Appeals Tribunal (Migration & Refugee Division) decided to affirm the delegate’s decision not to grant the applicant, Longdy Hong a Partner (Residence) (Class BS) visa on the grounds that it is not satisfied that the applicant’s marriage relationship is not genuine and continuing.*
61. Ground 1 does not identify any error. Rather, it summarises the Tribunal’s findings. The applicant himself agrees (in his written submissions at [51]) that this is the case.
62. Ground 1, accordingly, does not identify any error.

Ground 2

2. *The Tribunal committed a jurisdictional error by not taking into consideration the interest of the child ... if the applicant is refused a visa to remain in Australia.*

Applicant’s submissions

63. In relation to ground 2, the applicant submits:
- a) the applicant has raised the child since her birth and the applicant, child and sponsor live together as a family unit. If the applicant’s visa is refused it will impact the child as she will not have daily contact with the applicant. The Tribunal’s lack of consideration of the best interest of the child constitutes a jurisdictional error;

- b) the applicant believes he can invoke the Convention of the Rights of the Child (the “Convention”) as Australia has ratified the Convention. Hence, there is a “legitimate expectation” that Australia will act in conformity with the Convention. The Tribunal did not look at the Convention in the decision. This constitutes a jurisdictional error;
- c) this case differs from *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 (“*Teoh*”) as that case related to a visa refusal on character grounds. The applicant’s character in the present case is not in issue and, further, the child involved in *Teoh* was also the subject of the visa application. Here, the applicant’s step daughter is not a party to the visa application;
- d) each case before the Court will be judged on its own merits. In the applicant’s case the child needs a role model. The child is an Australian citizen and she has a right to have contact with her step father (the applicant). Children’s rights are “high upon the ladder” and there is an expectation one would look into the child’s welfare;
- e) the reasoning in *AZAEH v Minister for Immigration & Border Protection* [2015] FCA 414 (“*AZAEH*”) is related to a protection visa application and it should not be confused with the applicant’s case. The rights of partner visa applicants (including rights of step children) are different from those of protection visa applicants; and
- f) the Minister cites various cases but seems unable to cite any case that is relevant to the applicant’s circumstances. While the child is not a biological daughter, the interests of children and their rights should be the highest priority.

Minister’s Submissions

64. The Minister submits as follows:

- a) in *Teoh*, Mason CJ, Deane, Toohey and Gaudron JJ held that the ratification of the Convention gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interest of the applicant’s children as a primary consideration. It

was held that a decision-maker must look to a child's best interests as a primary consideration and then ask themselves whether the force of any other considerations outweighed it. That case involved a visa cancellation on character grounds, where the visa holder had children who would be affected by the cancellation of his visa. It is thus distinguishable from the present case.

- b) in *AZAEH*, Kenny J considered whether the bests interest of a child was a primary consideration in a protection claim matter. The visa applicant in that matter was the sole applicant and the family unit provisions had not been engaged. His Honour relevantly found that a decision-maker was not obliged to give primary consideration to the best interests of children if the children are not the subject of (or otherwise within) an application for a visa. The Court concluded that a decision to refuse a protection visa did not amount to an action concerning children within the meaning of article 3(1) of the Convention and, as a result, article 3(1) of Convention was not engaged on any view. The reasoning in *AZAEH* applies equally to the present case;
- c) there is nothing in the terms of the relevant provisions of the Act that applies in this case which warrants the conclusion that, in making an assessment of whether to grant the visa, primary consideration be given to the best interests of any children; and
- d) further, and in any event, the child is not the biological daughter of the applicant. Given the Tribunal's findings that the applicant and the sponsor were not in a genuine and continuing relationship, the best interests of the child was not a matter to which the Tribunal had to give primary consideration.

Consideration

65. Unfortunately for the applicant here, the "interests of the child" were not a mandatory consideration for the grant of the visa. Nothing in reg.1.15A(3) of the Regulations indicated that, in determining whether the applicant was the "spouse" of the sponsor, the Tribunal was required to consider the best interest of the child.

66. The extent to which the Tribunal was to consider the child was found in reg.1.15A(3)(b)(i) – ie, whether the applicant and sponsor shared care and responsibility for any children. The Tribunal considered this issue at [48].
67. The Minister is correct that the Tribunal was not required to give consideration to the Convention. The child was not a party to the visa and the refusal of the visa is not an “action concerning children”.
68. The Court is bound by *AZAEH*. To the extent that the applicant says that *AZAEH* is distinguishable because it concerned a protection visa, the Court does not agree.
69. In *Bui v Minister for Immigration & Citizenship* [2010] FCA 234 at [55]-[56] (“*Bui*”), the Court stated:
55. *The only inquiry to be made turns on the visa and review applicant’s genuine intention to live together as spouses. The best interest of the review applicant’s son was not a relevant consideration in the making of that inquiry.*
56. *On proper construction, the Minister’s decision is not an ‘action’ that concerns children as contemplated by the Convention. The Court finds that the Convention has no application in the present proceeding.*
70. Here, the only “inquiry to be made” was whether the applicant and sponsor were in a “married relationship”. The best interests of the sponsor’s child and the Convention were not relevant considerations in relation to that inquiry.
71. Further, if it is the case that the applicant felt that the Tribunal was required to take into account the Convention, he ought to have put that to the Tribunal. The delegate’s decision made no reference to the Convention and also gave no consideration to the “interests of the child”.
72. In circumstances where the interests of the child were not a relevant consideration, ground 2 cannot be made out.

Ground 3

3. *The Tribunal also erred jurisdictionally by not addressing the compassionate and compelling circumstances of the applicant in relation to the applicant's relationship with the child If the applicant leaves Australia the child will suffer as she is denied contact with the applicant.*

Applicant's Submissions

73. In relation to ground 3, the applicant submits:
- a) ground 3 concerns the Tribunal's oversight of the compassionate and compelling circumstances of the applicant's case. Refusal of a visa will have psychological impact on both the sponsor and the child. The sponsor has psychological problems (of which the Tribunal was aware) and the child's interests are affected in terms of her welfare. Overlooking these compassionate and compelling circumstances constitutes a jurisdictional error;
 - b) the Tribunal admits that that the applicant did care for the child and took care of the child's best interest and that the child is close to the applicant. The witnesses said that the applicant took care of the child as if she were the applicant's own child and the Tribunal did not dispute that the applicant was a caring step father;
 - c) according to the Minister, any difficulty the child would face due to the visa refusal is not a "mandated consideration". The applicant is puzzled about this aspect of the law. Compelling and compassionate considerations may not be enshrined in law but the Courts should give due consideration to these aspects with a view to making judicial decisions as human as possible in light of the human rights upheld in democratic societies like Australia;
 - d) the Tribunal took into consideration the applicant's close relationship with the step daughter. This reinforces the view that the interest of the applicant as a step-father ought to be taken into consideration;
 - e) the reason why the relationship with the child is close is because of the genuine and continuing spousal relationship with the sponsor; and

- f) it may be the case that the Tribunal did consider the step daughter's interests. However, the Tribunal overlooked the matters in relation to the child's interests vis-a-vis the Convention.

Minister's Submissions

74. The Minister submits:

- a) contrary to the applicant's claims, "compelling and compassionate circumstances" was not a mandatory consideration for the Tribunal. The issue the Tribunal was considering was whether the applicant was the "spouse" of the sponsor (as defined by the Act and Regulation) for the purposes of cl.801.221(2)(c) of the Regulations;
- b) whilst "any joint responsibility for the care and support of children" was relevant to the "nature of the household" factor to be considered under reg.1.15A(3) of the Regulations, any difficulty the child would face as a result of the visa being refused was not a mandated consideration; and
- c) in any event, the Tribunal did consider the relationship between the applicant and the child. The Tribunal noted the applicant's evidence that he and the sponsor were raising the child together and the sponsor's evidence that the applicant takes care of the child "like a normal father". It accepted that the applicant provided care and support for the child and considered the general comments of the applicant and the sponsor "as to their commitment to each other and to their commitment to raising" the child. Accordingly, it cannot be said that the Tribunal failed to consider (in so far as it had any relevance) the applicant's claims as to his relationship with the child and any impacts on her if the visa were refused.

Consideration

75. "Compelling and compassionate circumstances" are not a consideration within the context of the applicant's case. The issue before the Tribunal here was whether the applicant was the "spouse" of the sponsor – as that term is defined by the Act and Regulations. Nothing in that

definition required the Tribunal to consider “compelling and compassionate circumstances”.

76. On this basis, there is no inherent or express requirement to consider the *interests* of the child in determining whether the relationship meets the statutory definition. The Court again refers to the comments in *Bui* at [55].
77. The Court is also of the view that the *interests* of the child are not a matter that informs consideration of whether a married relationship exists or whether the applicant is a “spouse”.
78. Having failed to satisfy the Tribunal that he was the “spouse” of the sponsor, and noting that there was no requirement to consider “compelling and compassionate circumstances” when making that determinations (nor to consider the interests of the child), the Tribunal had no discretion but to refuse the visa.
79. Further, the extent to which the child’s interests were relevant to the inquiry of whether the applicant was the spouse of the sponsor was, in fact, considered by the Tribunal.
80. The Tribunal acknowledged the applicant’s evidence that he provided care and support to the child “like a normal father” (at [48]). The Tribunal also noted the photographs that were captioned “Longdy Hong with his daughter” (at [53]). The Tribunal also considered, in detail, any support arrangements in place for the child and found the evidence in this regard to be “inconsistent”. It also had doubts as to the “reliability” of the evidence provided. Finally, the Tribunal (at [60]) considered the applicant’s “commitment to raising” the child and looking after her as “her stepfather”. Ultimately, however, the Tribunal was not satisfied as to the genuineness of these statements. While this Court might not agree with Tribunal’s findings in this regard, this was a matter entirely for the Tribunal pursuant to its fact-finding function.
81. Ground 3, accordingly, is dismissed.

Additional Ground

82. The applicant contended that he was denied procedural fairness because the Tribunal had access to and had referenced information the

subject of a certificate and that information was not disclosed to him. At the hearing, the applicant also contended that the Tribunal was biased. Although not entirely clear, in this regard, it appears the applicant is saying that the Tribunal was biased because it had access to information which was prejudicial.

Applicant's Submissions

83. Although somewhat vague and often repetitive, the applicant seemed to contend overall that the Tribunal committed jurisdictional error as it did not reveal to him the contents of the certificate.

Minister's Submissions

84. The Minister's submissions can be summarised as follows:
- a) the Minister concedes that the certificate is invalid as it does not state on its face the basis for the public interest claim;
 - b) it is also conceded that, in the present case, the existence of the certificate was not disclosed to the applicant. Nor was the applicant invited to comment on the validity of the certificate;
 - c) ordinarily this would give rise to a breach of the Tribunal's procedural fairness obligations. However, the failure to disclose the certificate in this particular case did not result in any practical injustice. This is so for the following reasons:
 - i) the applicant was aware that there was information before the delegate which suggested that the sponsor had been overseas twice with Mr Toh and that the sponsor had listed Mr Toh as her emergency contact on an incoming passenger card dated 8 January 2014. The applicant was given particulars of the relevant information and was invited to comment upon it on 19 September 2014, to which he responded on 16 October 2014;
 - ii) the information the subject of the certificate was also referred to in the delegate's decision; and

- iii) the applicant provided pre and post-hearing submissions to the Tribunal. In each case, he responded to/addressed the matters covered by the certificate;
- d) in all the circumstances, the non-disclosure of the certificate in this case did not give rise to a denial of procedural fairness as the applicant was generally aware of the nature of the information covered by the certificate (notwithstanding that he may not have been aware of the certificate's existence) and he had provided extensive comment on that information to the delegate and to the Tribunal;
- e) knowledge of the existence of the certificate in this case could not have made any difference to the outcome of the review. Hence, there is no jurisdictional error arising in relation to the Tribunal's treatment of the material the subject of the certificate;
- f) in relation to the material covered by the certificate, it is noted that the delegate's decision was provided by the applicant to the Tribunal and, as such, the information in so far as it was contained in the delegate's decision was exempt, under s.359A(4) (b), from the operation of s.359A of the Act; and
- g) in any event, the information was formally put to the applicant and he was invited to comment on it by the delegate before the delegate's decision was made. Hence, no jurisdictional error arises in relation to the Tribunal's obligations under s.359A of the Act.

85. At hearing, the Minister responded to the applicant's submissions about the Tribunal being "biased" by referring to the submissions made in respect of s.359A of the Act.

Consideration

86. The Minister has conceded that here, the certificate, on its face, is invalid. The Court will proceed on this basis. It is also accepted that the applicant was not made aware of the certificate or asked to comment on the validity of the certificate.

87. Here, procedural fairness obliged the Tribunal to disclose the existence of the certificate: *Minister for Immigration & Border Protection v Singh* (2016) 244 FCR 305 at [53]-[59] (“*Singh*”). The applicant argues, on the basis of *Singh*, that there was an error in this regard and that his matter should be remitted.
88. There have been significant jurisprudential developments since *Singh*. Notably, the High Court recently had reason to consider the Tribunal’s procedural fairness obligations in relation to certificates, including invalid certificates.
89. The High Court judgment in *SZMTA* is relevant to this matter. The Court acknowledges that *SZMTA* concerned s.438 of the Act, not s.375A of the Act, and that these provisions are not identical.
90. Nonetheless, *SZMTA* remains relevant. For the purposes of this judgment, *SZMTA* provides as follows:
2. *The Full Court was correct to take the view that the fact of notification of the existence of a certificate triggers an obligation of procedural fairness on the part of the Tribunal to disclose the fact of notification to the applicant for review. Breach of that obligation of procedural fairness constitutes jurisdictional error on the part of the Tribunal if, and only if, the breach is material. The breach is material if it operates to deny the applicant an opportunity to give evidence or make arguments to the Tribunal and thereby to deprive the applicant of the possibility of a successful outcome.*
91. Here, the Minister submits that the failure to disclose the material the subject of the certificate did not result in any practical injustice to the applicant.
92. In order to determine if this is the case, the Court notes the analysis provided in *SZMTA*, as follows:
45. *Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.*

46. *Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.*

...

49. *Where non-disclosure of a notification has resulted in a denial of procedural fairness, the similar question that remains for the court on judicial review of a decision of the Tribunal is whether there is a realistic possibility that the Tribunal's decision could have been different if the notification had been disclosed so as to allow the applicant a full opportunity to make submissions. Whilst "[i]t is no easy task for a court ... to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome", the task is not impossible and can be done in these appeals.*

50. *In order to inform curial determination both of how the Tribunal in fact acted in relation to the notified document or notified information and of whether its decision could realistically have been different if the relevant breach had not occurred, evidence of the content of the document or information is relevant and admissible.*

93. The Court must be satisfied that the failure to disclose the material the subject of the certificate, or the certificate itself, was material in the sense that it deprived the applicant of the possibility of a successful outcome by not being able to present evidence or arguments.
94. The Court has before it the affidavit of Leith Ann Helsdon which annexed the documents the subject of the certificate. The Court has reviewed the documents.
95. The Court is not satisfied that the failure to reveal the certificate or the documents the subject of the certificate and the failure to invite the applicant to comment on the content of the certificate deprived the applicant of a successful outcome.

96. While the Tribunal did not disclose the fact of the certificate, the information the subject of the certificate was, in substance, disclosed to the applicant. The documents the subject of the certificate contained information that the sponsor and Mr Toh had travelled together on occasion, that the applicant had not travelled with the sponsor and that the sponsor had nominated Mr Toh as her emergency contact on her incoming passenger card.
97. The information the subject of the certificate related to matters that the applicant was invited to comment on by the delegate in the invitation to comment dated 19 September 2014. The applicant provided a response dated 16 October 2014. In this regard, the Court notes the applicant's response at CB 203-204 which directly responds to the information the subject of the certificate.
98. In the delegate's decision, under the heading "Social Aspects", the delegate discussed the information the subject of the certificate and the applicant's response to that information (CB 254).
99. Following the delegate's decision, and on review to the Tribunal, the applicant provided written submissions. Those submissions repeated the response that was provided to the delegate in relation to the information (CB 298-299). The applicant then responded to the delegate's consideration and the findings it made in relation to the information the subject of the certificate and outlined why he disagreed (CB 304-307).
100. The applicant also appeared to give evidence on matters related to the information the subject of the certificate at the Tribunal hearing (see [29], [54] and [59]). The applicant also provided post hearing submissions addressing the substance of the information (CB 434).
101. Against this background, the Court is not satisfied that the failure to disclose the certificate and the information the subject of the certificate was material. The substance of the information was clearly an issue that the applicant was aware of and had been invited to comment upon (and did comment on), on four different occasions.
102. Accordingly, the Court is not satisfied that there was any practical injustice in the failure to disclose the certificate or the materials the

subject of the certificate to the applicant: *BEG15 v Minister for Immigration & Border Protection* [2017] FCAFC 198 at [33]. On that basis, there was no jurisdictional error: *SZMTA* at [2].

103. To the extent the applicant states that his case is the same as *Singh*, the Court emphasises that in *Singh* the issue of materiality was not raised.
104. The Minister also referred to the obligations in s.359A of the Act, which requires the Tribunal to put clear particulars to the applicant of any adverse information that would be part of the reason for affirming the decision. Here, the documents the subject of the invalid certificate were part of the reason for affirming the decision. The question is whether they were required to be put to the applicant for comment.
105. The Minister referred the Court to the decision in *Tumil-Ang v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2019] FCA 1824 at [13]-[14], wherein the Federal Court stated:

13. *In the present case, the fact that the certificate and transcript reportedly issued by Saint Louis University were bogus documents was obviously information that the Tribunal considered would be the reason or part of the reason for affirming the decision that was under review. The Tribunal did not put that information to Mr Tumil Ang in any letter under s 359A. However, the information formed an important part of the decision of the delegate of the Minister which was the subject of the Tribunal's review. The nature and substance of the information and its importance to the question of the refusal of the visa application was set out clearly in the delegate's decision.*

14. *As part of the normal process of initiating a review, the delegate's decision was then given to the Tribunal in order for it to conduct its review. The Minister submits, and I accept, that this means that the Tribunal was not required to give Mr Tumil Ang particulars of the information in question, namely the information which was an important part of the reason for affirming the decision that is under review to, by reason of the exception in s 359A(4)(b). The Tribunal's omission to provide that information is therefore not a failure to comply with the natural justice hearing rule, as modified and stated exhaustively in relation to this subject in Division 5, Part 5 of the Migration Act. Apart from that, neither before the Federal Circuit Court or in this*

court has Mr Tumil Ang identified any information that was required to be disclosed by the Tribunal under s 359A.

106. Here, the information to which the certificate related was referred to in the delegate's decision and informed an important part of the delegate's reasons for refusing the visa. The Court does not accept that the adverse information in the certificate was required to be put to the applicant as it was, as the Minister submits, exempt under s.359A(4)(b) – that is, because the applicant provided the delegate's decision to the Tribunal.
107. Finally, the applicant indicated that the Tribunal was “biased” because it referenced the contents of the certificate without asking for comment.
108. Although not entirely clear, the Court understands the applicant to be suggesting that the Tribunal displayed apprehended bias. The test for apprehended bias is whether a fair-minded and appropriately informed lay observer might reasonably apprehend that the Tribunal might not bring a fair, impartial and independent mind to the determination of the matter on its merits: *SZRUI* at [2].
109. Here, the Court does not accept that the certificate or the information the subject of the certificate would cause a fair-minded and appropriately informed lay observer to apprehend that the Tribunal was not impartial. The information the subject of the certificate did not disclose any additional material that was not already before the Tribunal either in the form of the delegate's decision or the applicant's own submissions: *CNY17 v Minister for Immigration & Border Protection* [2018] FCAFC 159 at [134] and [136].
110. The applicant has failed to satisfy the Court that the certificate gives rise to any apprehension of bias on the part of the Tribunal.
111. For the reasons discussed above, no error arises in relation to the certificate before the Tribunal.

Other Matters

112. The applicant (in his written submissions) makes a number of comments about various parts of the Tribunal's decision. The Minister,

in turn, also referenced various aspects of Tribunal's decision. Any issues that arise in this regard are discussed below.

Applicant's submissions

113. In effect, the applicant stated:

- a) the sponsor was busy raising the child and at the time of the Tribunal hearing and was suffering. The Tribunal was aware of this. Any evasiveness on the part of the sponsor at the hearing resulted from her fragile state of mind at the time of the hearing;
- b) the Tribunal found that, having regard to all the evidence, the sponsor and the applicant had sought to conceal the paternity of the child by not disclosing the father's name on the birth certificate. However, the applicant told the Tribunal that, at the time of the birth of the child, the sponsor was unsure of the paternity of the child. Nevertheless, the applicant and sponsor lived together as husband and wife. The applicant and sponsor requested the Tribunal not to dwell on the issue of the child's paternity;
- c) the joint account and superannuation (which identify the sponsor and step child as beneficiaries) ought to count as significant in relation to establishing a relationship. The fact that the Tribunal overlooked this is "mystifying";
- d) the Tribunal accepted that the applicant and the sponsor shared day-to-day household expenses and that the sponsor had access to the funds in the joint account. It is difficult to understand why this did not evidence "[a] genuine, exclusive and continuing spousal relationship";
- e) Mr Toh contributed to the support of the child and contributed to the house loan. He is a joint owner of the house because the sponsor had a negative credit rating and she was unable to get a loan. The Tribunal did not ask for the sponsor's credit history;
- f) the applicant and sponsor in no way made claims with a view to "bolstering my claim for the visa". The Tribunal gave too much weight to Mr Toh's role in the relationship;

- g) the evidence given in relation to financial aspects may have “perplexed” the Tribunal due to the intricacies involved. The Tribunal ought to have given greater weight to the financial circumstances;
- h) if the Tribunal found household aspects inconclusive of an ongoing relationship because of the sharing of the house among several family members, it ought not to be concerned as Cambodians are comfortable in sharing;
- i) the joint social activities ought not to be an issue due to the nature of the family and work commitments. More than 10 persons testified to that both orally and in written statements taken under oath;
- j) it may be the case that the Tribunal went through an “intellectual process” of giving due consideration to the four principal matters in reg.1.15A(3) but the Tribunal nonetheless affirmed the delegate’s decision to the applicant’s disadvantage. It should not have done so; and
- k) the Tribunal may have been biased by giving greater weight to the fact that the child was not the applicant’s biological daughter. Viewed in this light, the Tribunal did not make an objective “factual finding” consistent with the four matters in reg.1.15A(3). Rather, the Tribunal made an “evaluative finding” which was subjective and not based on the evidence before it.

114. Much of what appears above simply takes issue with the Tribunal’s findings and seeks an impermissible merits review. However, the Court has attempted to extract from the above argument that identifies “an error” on the part of the Tribunal. From the summary provided above, the Court can identify the following alleged “errors”:

- a) the Tribunal made an unreasonable or illogical credibility finding;
- b) the Tribunal’s findings are not supported by evidence; and
- c) the Tribunal was biased.

Minister's Submissions

115. In relation to these “errors”, the Minister submitted as follows:

- a) the Tribunal engaged in an intellectual process and gave proper, genuine and realistic consideration to each of the of the four principal matters (and the considerations thereunder) as set out in reg.1.15A(3), in accordance with *He v Minister for Immigration & Border Protection* [2017] FCAFC 206 (“He”);
- b) in the present case, the Tribunal made findings about each of the four principal matters (and considerations thereunder) in the Regulations. The Tribunal articulated features of the relationship which caused it to doubt the applicant’s claims that the parties were in a genuine and continuing relationship, and made factual findings about those matters.
- c) in the circumstances, the Tribunal met its obligations under, and complied with the requirements of, s.5F of the Act and reg.1.15A of the Regulations;
- d) in considering the matter, it was open to the Tribunal to make findings that evidence on a particular factor was inconclusive, or that there was no material, or insufficient material, to be able to form a conclusion on a particular matter. Such findings do not give rise to jurisdictional error, or suggest that the Tribunal did not engage in an active intellectual process and give proper consideration to any matter; and
- e) the findings made by the Tribunal were open to it in light of its consideration and assessment of the evidence before it. The weight to be given to the evidence, and findings as to credibility, were matters for the Tribunal.

Consideration

Credibility findings

116. The Tribunal found at [42] as follows:

42. *As a preliminary matter, the Tribunal sets out at this point its concerns as to the credibility of some of the evidence of*

the applicant and his sponsor. These concerns developed in its review of this matter and in considering and weighing all of the evidence. It has ignored minor inconsistencies, for example where the applicant has claimed that the funds for the deposit for the house in Ellen Brook came from the sponsor's parents, but in a written submission claimed they came from his parents. However, more significantly, the Tribunal found the sponsor's oral evidence at the hearing appeared to be evasive at times, when, for example, she spoke about the support provided by Mr Toh in respect of [A]. In this respect, it found the sponsor and the applicant provided inconsistent evidence on Mr Toh's financial contribution to the house and the support Mr Toh claimed by the applicant that he provides for [A]. This is discussed further in the relevant paragraph below. It also found the applicant's and his sponsor's explanation of the financial arrangement in respect of the purchase of the property in [address omitted] Ellen Brook to be unconvincing, at times confusing, and at other times inconsistent. For example, the Tribunal was told Mr Toh does not pay mortgage, but then it was provided with a statement indicating he is a joint borrower, with the applicant, in a significant loan with the NAB. It was also submitted that Mr Toh pays \$200 per week to repay the deposit which was paid by the sponsor's parents, whereas this was also referred to as repayments towards the mortgage. The Tribunal also notes the applicant - has claimed that the sponsor's brother also pays the mortgage for the property. Having regard to all of the evidence, the Tribunal also formed the view that the applicant and the sponsor sought to conceal the paternity of the child [A] from the Department by not disclosing her father's name on the birth certificate, and by not declaring to the Department the uncertainty, if uncertainty indeed exist, of the paternity of the child. It notes the submission from the applicant now indicates that the birth certificate has been amended. Other aspects in the circumstances of this case, as set out in the following paragraphs, add to the Tribunal's concerns about the credibility of the applicant's and the sponsor's evidence and to the lack of satisfaction that this is a genuine and continuing spousal relationship.

117. On their face, the applicant's submissions rise no higher than a disagreement with the Tribunal's assessment of his and the sponsor's credibility as witnesses. Matters of credit are findings of fact for the Tribunal. The Court will not generally interfere with findings of this

sort: *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67].

118. Here, in fairness to the applicant (who was unrepresented), the Court has considered whether the Tribunal's credibility findings were illogical or unreasonable and whether the Tribunal denied the applicant procedural fairness: *ARG15 v Minister for Immigration & Border Protection* [2016] FCAFC 174.
119. The applicant takes issue with the Tribunal finding that the sponsor was "evasive" at times. The applicant says that to the extent that the sponsor was evasive this was because she was depressed at the time of the hearing. The medical evidence the applicant provided to the Tribunal indicated that the sponsor was taking medication for anxiety – not that she was depressed. The Tribunal expressly acknowledged submissions made about the sponsor's "anxiety": (see [33]-[34] and [61]).
120. The Court is not in a position to determine whether the sponsor was or was not evasive. In any event, it is not the case that "evasiveness" was used as a basis to undermine the sponsor's evidence in its entirety. Given the Tribunal's comprehensive statement at [42], and other references to inconsistencies and concerns that arose from the evidence overall, the Court is satisfied that the Tribunal's reference to the sponsor's evasiveness was logical and reasonable and entirely open to it.
121. The applicant also refers to the Tribunal's finding that he and the sponsor sought to conceal the paternity of the child's father, noting that he asked the Tribunal not to dwell on this issue. The Tribunal expressly acknowledged the request not to "dwell" on the issue of the child's paternity and stated that it did not, in fact, "dwell" on this issue (see [57]).
122. The Tribunal's view that the applicant and the sponsor sought to conceal the paternity of the child was based on the various concerns it had with the applicant's evidence and the sponsor's evidence. It was open to the Tribunal, in light of the various inconsistencies, to form the view it ultimately formed. Again, this was but one of a number of

concerns the Tribunal had in relation to the credibility of the applicant and his sponsor.

123. Overall, the Court is satisfied that the Tribunal did not err in relation to its findings as to credibility. The Tribunal's concerns were soundly based and reasonably open on the evidence.

Illogicality

124. Before this Court, the applicant seemed to concede that the findings the Tribunal made were open to it. Nonetheless, the Court has considered the Tribunal's decision in detail to determine if issues of illogicality arise.

125. The Court accepts the Minister's submissions that the Tribunal's reasons demonstrate an active and intellectual engagement with each of the relevant considerations of reg.1.15A(3). Not only does the Tribunal use these matters as a signpost in its reasons, it expressly uses the language of each of the integers throughout its decision and when making findings.

126. Bearing in mind the reasonably impressionistic and evaluative nature of the Tribunal's task it is apparent that:

- a) in considering the financial aspects of the relationship the Tribunal noted that there was evidence of a pooling of financial resources and sharing of day-to-day household expenses. However, there were inconsistencies and deficiencies in some parts of the evidence which led the Tribunal to conclude that the financial aspects of the relationship were not determinative and were of less weight than other aspects of the relationship. The consideration at [43]-[47] contains the necessary express and implicit findings in relation to reg.1.15A(3)(a);
- b) in relation to the nature of the household, the Tribunal's reasons at [48]-[50] are akin to those that were discussed in *He* at [76]. Namely, acknowledging that there was evidence in relation to each of the matters in reg.1.15A(3)(b), it was found that in light of the concerns it had with the other evidence the evidence submitted in relation to the nature of the household was

“inconclusive” in relation to the question of whether the applicant and sponsor were in a genuine and continuing relationship;

- c) in considering the social aspects of the relationship, the Tribunal found that while the applicant had provided evidence that he and the sponsor represented themselves as a married couple, attended social events together and that friends considered the relationship to be genuine, this evidence was not persuasive and was “limited”. Critically, at [54] the Tribunal expressly addresses each of the matters in reg.1.15A(3)(c) to find that the evidence provided in relation to the social aspects of the relationship was insufficient to conclude that the relationship was genuine; and
- d) when considering reg.1.15A(3)(d), the Tribunal’s reasons at [55]-[61] are comprehensive. Both express and implicit findings can be drawn from the discussion provided. For example, the Tribunal expressly finds that it was not satisfied that the relationship was seen by the applicant and sponsor as a “long term one”. It can also be implied from [57]-[60] that the Tribunal found that the degree of emotional support and companionship between the applicant and sponsor to be lacking.

127. Ultimately, the Court is satisfied that the Tribunal properly considered each of the matters in reg.1.15A(3) of the Regulations. The Tribunal analysed and engaged with the evidence the applicant advanced in respect of each of those matters to inform itself of the ultimate statutory question: whether the applicant was the “spouse” of the sponsor.

128. To the extent that the applicant states that the Tribunal “overlooked” the fact that the sponsor and child were his superannuation beneficiaries, this cannot be sustained. The Tribunal acknowledged this at [43]-[44]. To the extent that the applicant says that it was “mystifying” the Tribunal did not consider this as “significant”, it was a matter for the Tribunal as to what weight it gave the evidence: *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 at [27].

129. At [44] the Tribunal expressly acknowledged that evidence about superannuation beneficiaries may, in some cases, indicate a genuine

relationship. However, in the applicant's case, having regard to all of the evidence (and in particular deficiencies in the other evidence before the Tribunal), the Tribunal was not satisfied that it did so here. That was a finding open to be made and cannot be said to be "mystifying".

130. The same reasoning applies to the Tribunal's finding that the sharing of day-to-day household expenses was not necessarily indicative of a genuine, exclusive and continuing spousal relationship. The Tribunal stated at [43] that it accepted that some of the documents "may point to" a genuine relationship. It was a matter for the Tribunal to determine whether these documents "did point to" a genuine relationship. Here, it was not satisfied, in light of all the other evidence, that it did in fact evidence a genuine relationship.
131. In relation to the applicant's submission that the Tribunal did not ask for the sponsor's credit rating, it is not for the Tribunal to seek information to bolster an applicant's claim. Nor must the Tribunal notify the applicant of the absence of otherwise important evidence: *Minister for Immigration & Citizenship v SZNVW* [2010] FCAFC 41 at [36] and [49].
132. Insofar as the applicant contends that the Tribunal may have misunderstood the "intricacies" of the evidence, the Court does not consider this to be the case. The Tribunal clearly engaged with the matters the applicant raised. The decision provided is forensic and detailed. It does not point to a Tribunal that was "confused". Rather, the Tribunal's reasons overall suggest that it understood exactly what the applicant was saying but simply determined that it did not accept much of that evidence.
133. Most of the applicant's submissions go no higher than expressing disagreement with the Tribunal's reasons and findings. Overall, the Court is satisfied that the Tribunal has properly conducted the review in question according to law.

Bias

134. The Court has already addressed the applicant's concerns about bias arising from the certificate. Any bias concerns addressed here are in response to the applicant's submission that the Tribunal was biased

because it placed undue weight on the fact that the child was not the applicant's biological daughter.

135. It is well settled that an allegation of bias is one that must be distinctly made and clearly proven: *Minister for Immigration v Jia Legeng* (2001) 178 ALR 421 ("*Jia Legeng*") To prove bias, it is for the applicant to establish that:
- a) the Tribunal, in the case of actual bias, was so committed to a conclusion that regardless of the evidence or arguments presented that conclusion was not open to persuasion and incapable of alteration: *Jia Legeng* at [71]-[72]; or
 - b) the Tribunal, in the case of apprehended bias, conducted itself in a way that a fair-minded person would reasonably believe that the IAA had not brought an impartial mind to deciding the applicant's case: *SZRUI* at [2].
136. There is nothing on the decision record to suggest that the Tribunal was in any way biased toward the applicant. The Tribunal extensively referred to the evidence, accepted many aspects in favour of the applicant and sponsor or, alternatively, gave them the benefit of the doubt (see, for example [45] and [46]).
137. In relation to the specific submission that the Tribunal was biased because it placed undue weight on the fact that the child was not the applicant's biological daughter, it is noted that the Tribunal at [57] states as follows:

The Tribunal considered the evidence given by the applicant and his sponsor, including the DNA Test results, whereby this indicates, to a very high degree of probability, that Jeremy Toh is the biological father of the sponsor's daughter [A]. The Tribunal notes from the copy of [A]'s birth certificate which was submitted to the Department, that she was born on 12 September 2014, some sixteen months after the sponsor and the applicant's registered marriage. The Tribunal was urged in the applicant's submission "not to dwell" on this matter; and it does not dwell on it. However, it considers this to be a matter of some importance in a case such as this. The applicant has submitted that the sponsor had a night out with Mr Toh and became pregnant to him. It was also submitted that she was lonely at the time as the applicant was working a lot and she became "emotionally disturbed". The

Tribunal accepts that such things sometimes occur in the stressful and complicated lives the people live, and it would otherwise place less weight on this, but for the other evidence in this case. The other evidence includes what the Tribunal has found to be unsatisfactory and unclear explanations of the financial arrangements between the applicant and Mr Toh and the sponsor's parents, and other evidentiary shortcomings to which the Tribunal refers in this decision record.

138. This passage demonstrates that the Tribunal did not place undue weight on the paternity of the child's father. Nor does it indicate that the Tribunal was biased in the sense that it used the paternity of the child to make findings that were not "objective". The weight given to the paternity of the child did not inform the Tribunal's evaluation of the other evidence before it (that is, it did not cause the Tribunal to reject the other evidence). Rather, other concerns and evidentiary shortcomings informed the weight the Tribunal attached to the paternity issue.
139. There is nothing here to suggest that the Tribunal prejudged or closed its mind to the applicant being the "spouse" of the sponsor on the basis that he was not the biological father of the child.
140. Finally, the applicant says that the Tribunal made an "evaluative finding" which was subjective and not based on the evidence before it. The Tribunal's task is impressionistic and evaluative in nature: *He* at [82]. The Tribunal is required to reach an inherently evaluative conclusion: *He* at [78]. Here, the Tribunal understood the task before it. It in no way acted in a subjective or biased manner.
141. Overall, the applicant's submissions and his affidavit do not identify any error.

Conclusion

142. Overall, the applicant has not satisfied the Court that the Tribunal engaged in jurisdictional error.
143. The application is, accordingly, dismissed.

I certify that the preceding one hundred and forty three (143) paragraphs are a true copy of the reasons for judgment of Judge Kendall

Associate:

Date: 5 December 2019